IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905

KNOXVILLE WATER COMPANY, Appellant,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, ET AL, Appellees.

No. 123

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

May it Please Your Honors:

This suit was instituted by a bill in equity filed in the Circuit Court of the United States, sitting at Knoxville, Tennessee, by the appellant Knoxville Water Company, a Tennessee corporation, against the Mayor and Aldermen of the City of Knoxville, a municipal corporation, and certain citizens of that city constituting its Water Works Commission, for the purpose of enforcing, and preventing an impairment of, the rights of said company under certain contracts which had been entered into between it and said city, by restraining ap-

pellees, the City and its Water Works Commission, from building and operating under the authority of an Act of the General Assembly of Tennessee, a system of water works in competition with the plant, property and business of appellant.

A temporary restraining order was granted upon the filing of the bill, but upon demurrer the bill was dismissed and an injunction, or continuance of the restraining order refused, whereupon the Water Company prayed, and having assigned errors (Rec. pp. 96-98), was granted an appeal to this Court.

MATERIAL FACTS SHOWN IN THE BILL.

The bill, among other things, shows:

In 1880 the appellee City of Knoxville was, and for many years theretofore had been, a municipal corporation vested with full power and authority to provide itself and inhabitants with a supply of water for fire protection, public, sanitary and domestic purposes (Appendix A to this brief), but this power had not been exercised, so that the city was without a water supply, either for public purposes or domestic uses; however, about the year 1880, the city determined to build a water plant for the purpose of supplying itself and its inhabitants with water and to that end had prepared by one Moses Lane, plans and specifications for a complete system and acquired the necessary real estate upon which to locate a pumping station and reservoir, but after these things had been done, it became apparent to the corporate authorities that the construction and maintenance of a plant sufficient to supply the needs of the city and its inhabitants would involve a much larger sum than the city could safely assume and therefore it was determined by the proper authorities that the interests of the city and its inhabitants would be best subserved by entering into a contract with some individual company or private corporation to build a plant sufficient to supply water to the city and its inhabitants,

and thereupon the municipal authorities, by advertisement, invited bids and proposals for the construction of a water plant to be owned by the builder, but which the city should have the right to purchase at a certain period or periods to be agreed upon.

Rec., pp. 3-4.

To meet such conditions existing in said city, then having between nine and ten thousand inhabitants, and after the consent of the corporate authorities of appellee city had been duly obtained and endorsed on the application for a charter, as required by the act of the Legislature of Tennessee (Acts of 1877, Ch. 104. Appendix B), providing for the incorporation of water companies, a charter of incorporation was granted by the State to the Knoxville Water Co., appellant herein, for the purpose of investing it with the right and making it the duty of said Company to establish and construct a system of water works in or near said city of sufficient capacity to furnish the corporate authorities and the inhabitants of said city with water; and authorizing said corporation to enter upon the streets of said city and lay down therein its pipes and mains—to construct reservoirs and erect fire hydrants, and to supply water to the city and its inhabitants, and to contract both with the corporate authorities and the inhabitants of said city for the use of said water and charge such prices therefor as might be agreed upon between said parties.

Rec., pp. 3, 28-31.

In response to the advertisement made by the city for bids and proposals to construct a water plant, as above shown, the Knoxville Water Co. submitted, in competition with others, a proposition, which being deemed the most advantageous to the city, was accepted by it, and thereupon a contract was entered into between the city and the Water Company for the con-

struction, operation and maintenance of a system of water works by said Company of sufficient capacity to supply the city and its inhabitants with water for fire protection, public, sanitary and domestic purposes. This contract was exhibited with and made part of the bill, and thereby said Water Company, among other things, agreed:

(a) To erect and establish upon and on the land acquired by the city for that purpose, and in accordance with the plans and specifications prepared for the city by one Moses Lane, a system of water works **sufficient to supply the city and its inhabitants with water for all purposes stipulated in said contract,** to be taken from the Tennessee River at the site purchased by the city for that purpose.

Rec., pp. 4, 5-34.

(b) To purchase from the city the property acquired by it, including land, plans, specifications, etc., for the purpose of erecting water works and to pay therefor within thirty (30) days after the execution of said contract, and before commencing the construction of said works, the sum of $7,800.00.

Rec., pp. 5-35.

(c) To erect at the points designated upon said Moses Lane plan seventy-five (75) fire hydrants, and afterwards, from time to time, as many additional hydrants **as the necessity of the city might require.**

Rec., pp. 5, 34-35.

(d) To furnish water free of charge (except hydrant rental), to said city from such hydrants for flushing its sewers and gutters and for all purposes of the fire department, the City Hall building and offices and prisons therein.

Rec., pp. 5-35.

(e) To supply private consumers with water not to exceed a maximum rate fixed in the contract and to complete the construction of the plant within twelve months.

Rec., pp. 35-36.

(f) To maintain said water works in such condition as may be sufficient and necessary to enable said company to comply with its undertakings set out in said contract for a period of thirty (30) years from January 1st, 1883, unless said city should become the owner of said water works within that period in the manner stipulated in said contract.

Rec., pp. 5-36.

(g) To so amend its charter as to limit its bonded indebtedness to one hundred and fifty thousand dollars ($150,000.00).

Rec., pp. 5-37.

Among other things material to be noticed the city agreed:

(a) To grant and guarantee to said company all right to enter upon any and all of the streets, squares, lanes and alleys under its control.

Rec., pp. 5-37.

(b) Not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes, alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty (30) years from the 1st day of August, 1883, provided the company complied with the requirements and obligations imposed upon and assumed by it under and by virtue of said contract and agreement.

Rec., pp. 5-37.

(e) To pay said company fifty dollars ($50.00) per annum for each fire hydrant erected under said contract, that is, all the hydrants that the necessity of the city might require.

Rec., pp. 5, 37-38.

Further it was mutually agreed that (1) at the expiration of fifteen years from the first day of August, 1883, **said city should have the right to purchase from said company all the property, rights, franchises and privileges provided in and growing out of said contract,** "by negotiation, if thus a price could be agreed upon, and if not, then at any time for a consideration to be fixed and determined by appraisers," in a manner specifically stipulated in said contract; and (2) **that said contract should not be assigned or transferred to any person or corporation whosoever.**

Rec., pp. 5, 6, 38-39.

The water plant provided for by said contract was duly built as therein, and within the time, stipulated. At this date the municipal limits of said city comprised only the first nine wards as they now exist, and the plant of said company in said wards was built in compliance with and under said contract.

Rec., p. 6.

After the Water Company had erected its plant and, as therein required, had been supplying, for some time, both the city and its inhabitants with water, the municipal authorities refused to pay the hydrant rental which had accrued under the contract upon the grounds, as claimed, that said contract was not valid and that the Water Company had not complied therewith. In a suit instituted by the Water Company to enforce said contract and collect the accrued hydrant rentals, both of said contentions were adjudicated against the city by

the Chancery Court of Knox County and, upon an appeal, by the Supreme Court of Tennessee.

Rec., pp. 6-7.

After this litigation had been determined in favor of the Water Company the contract of July 1, 1882, was, about February 9, 1888, amended so that, among other things favorable to the city, the hydrant rental was reduced from $50.00 to $45.00 per annum on all hydrants over one hundred.

Rec., pp. 8, 42-43.

On April 18th, 1891, the town of North Knoxville, then a municipal corporation contiguous to the City of Knoxville, entered into a contract with Wheeler and Parks, for the purpose of securing a supply of water for said town and its inhabitants until June 3rd, 1913, which contract, by permission of the corporate authorities of North Knoxville, was duly assigned to the Knoxville Water Company, who in all respects complied with its provisions by building and operating the water plant therein provided for. This contract was exhibited with and made a part of the bill.

Rec., pp. 8, 44-52.

In 1885 the General Assembly of the State of Tennessee provided another form of charter for water companies, different from that provided by the Act of 1877, under which the Knoxville Water Company was chartered, in that no right was reserved therein to regulate water charges or rates, and in the form prescribed by this Act, on July 28th, 1891, the Lonsdale-Beaumont Water Company was chartered for the purpose of establishing and constructing water works adjacent to the town of West Knoxville, then a separate municipality contiguous to the City of Knoxville, and by and in its said charter it was made the duty of said company, "to build water works

and provide machinery in or adjacent to said town of **sufficient capacity to supply said town and the inhabitants thereof with a plentiful supply of water,**" and on September 17th, 1892, said town of West Knoxville and said Lonsdale-Beaumont Water Company entered into a contract by which said Water Company agreed to erect and build, and did erect and build, a system of water works to supply said town and its inhabitants with water for a period of twenty years and reserved to said city the right to purchase said water plant after the expiration of seven years at such price as the parties might agree upon, or upon an appraised valuation, in the event the parties were unable to agree.

The power and authority vested by the laws of the State of Tennessee in said towns of North and West Knoxville in regard to water supply were set forth in their respective charters as follows: "**To provide the town with water works, or contract with others for water within or beyond the town limits, for town and corporate purposes.**" The charter of said Lonsdale-Beaumont Water Company and the contract entered into between that company and the town of West Knoxville are exhibited with and made parts of the bill.

Rec., pp. 8, 9, 53-56, 58-66.

By Chapter 323 of the Acts of the General Assembly of the State of Tennessee for 1897, the City of Knoxville and said towns of West and North Knoxville were consolidated—the town of West Knoxville becoming the Tenth Ward and the town of North Knoxville becoming the Eleventh Ward of the City of Knoxville—and by Sec. 8 of said Act of consolidation, it was enacted, "**that all valid and lawful contracts of the town of West Knoxville and of North Knoxville should be carried out and performed by the Board of Mayor and Aldermen of the City of Knoxville.**" So that said North Knoxville and West

Knoxville water contracts became obligations of appellee, the Mayor and Aldermen of the City of Knoxville.

In 1899 the consent of the appellee City of Knoxville was duly given, in compliance with the laws of the State of Tennessee, to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and, by ordinance duly passed on October 20th, 1899, and accepted by the Water Company on the same date, it was, among other things, agreed between said consolidated company, under the name of the Knoxville Water Company, and the City of Knoxville, that the right to purchase the plant and property of the original Knoxville Water Company, reserved by the city in said contract of July 1st, 1882, should be and was extended so as to cover all of the property, franchises, rights and privileges then owned by the Knoxville Water Company or which might thereafter be acquired by it; and that in order to fund the existing debts of said two companies and to provide funds to improve the consolidated plant and make extensions thereto, the limit upon the indebtedness of the consolidated company, provided in said contract of July 1st, 1882, was extended from one hundred and fifty thousand dollars ($150,000) to eight hundred thousand dollars ($800,000.00), with the provision that no bonds should be issued in excess of eight hundred thousand dollars, even for improvements, except upon a sworn certificate showing the actual cost of the additions or improvements for which such bonds should be issued.

Rec., pp. 10, 11, 67, 68, 69, 70.

In 1901 the City of Knoxville by ordinance arbitrarily reduced the rates which the Knoxville Water Company was then charging for water about 22 per cent. The Water Company denied the right of the city to regulate its rates, but it was determined in litigation between the Water Company and

the city involving that question, both by the Supreme Court of Tennessee (107 Tenn., 647), and by this Honorable Court (189 U. S., 434), that, notwithstanding the contract between the parties hereto, by virtue of the second section of the act under which the Knoxville Water Company was chartered, the City of Knoxville had the right to reasonably regulate the price of water furnished by said company to said city and its inhabitants. Thereupon said Water Company instituted a suit in equity in the Circuit Court of the United States at Knoxville, attacking the ordinance of said city reducing its rates, upon the ground, among other things, that the same was unreasonable and in violation of the 14th amendment to the Constitution of the United States and such proceedings had been had in said cause when the original bill in this case was filed, that the Master to whom the question had been referred had reported that said ordinance was unreasonable and invalid because the same would not yield said company a fair return upon the value of the plant used in furnishing water to said city and its inhabitants.

Rec., p. 12.

By 1903 there had been developed a strong feeling among the inhabitants of the City of Knoxville in favor of said city owning and operating for itself and its inhabitants a water plant, and to the end that the city might be enabled to enforce its right to purchase the plant and property of appellant, the representatives of Knox County, including the City of Knoxville, in the General Assembly of Tennessee, introduced, and pressed for passage by that body, a bill which was enacted into a law known as Chapter 12 of the Acts of 1903. This Act, a copy of which is exhibited with and made part of the bill (Rec., pp. 71-74), after reciting the execution of the contract of July 1, 1882, and the amendment thereto of October 20, 1899,

and the rights therein reserved to the city to purchase the plant and property of said company, and the desire of the city to enforce said right, authorized the city to issue a sufficient amount of bonds to pay for the plant and property of appellant to be determined by an appraisal under said contract, provided said appraisal and purchase should be approved by two-thirds of the qualified voters of said city voting in an election to determine that question.

Rec., pp. 13, 71-74.

Thereafter, during the same session of the Legislature, it developed, as alleged in the bill, by renewed agitation in the City of Knoxville that it was the desire of certain parties to pass another Act authorizing the said city to build and construct a plant to be run in competition with the plant of appellant, "so that such power and authority might be used as a club to compel said company to sell its plant for less than it was worth and to deprive it of its contract rights under its aforesaid contract of July 1st, 1882, and the ordinance contract of October 20th, 1899, and to enable the city to acquire the plant and property of said company upon its own terms freed from the provisions of said contract of July 1st, 1882, in respect of the appraisal of the plant and property" of said company; so that another bill was offered to the General Assembly authorizing said city to issue seven hundred and fifty thousand dollars ($750,000.00) of bonds to enable it to build and construct a separate and independent plant, coupled with certain provisions authorizing it to negotiate with said company for the purchase of its plant and property without reference to its contract rights hereinbefore referred to. This Act was passed on March 31st, 1903, approved by the Governor on April 3rd, 1903, and is known as Ch. 153 of the Acts of 1903, and was exhibited with and made a part of the bill.

Rec., pp. 13, 14, 74-80.

As provided in Sec. 4 of Ch. 153 of the Acts of 1903, certain citizens of said city, named as defendants in the bill, were appointed and elected members of a water works commission of said city, and after it had been organized by the election of a chairman and secretary, said commission addressed on September 28, 1903, a written communication to appellant calling attention to the power vested in it and asking whether appellant would sell to the City of Knoxville its plant and franchises, and, if so, at what price and upon what terms. To this communication the Water Company on October 19th, 1903, replied, in substance, that it recognized the right of the city to purchase its plant and property under the contract of July 1, 1882; that it was entirely willing to comply with all of the obligations imposed upon it by said contract and to sell to the city its plant and property at a price to be determined in the manner specifically provided in said contract, and further, after stating that there would be no serious disagreement in respect of the "terms" of payment when once a fair price should be determined upon, assured said commission that it would be pleased to at once take up the matter with the city authorities to the end that the provisions of said contract respecting the sale by the Company and the purchase by the city might be consummated. The Water Company received no further communication upon this question from either of the appellees, until on April 18, 1904, it received a communication from said commission, under date of March 22, 1904, wherein, after acknowledging receipt of the reply of appellant above referred to, it was stated that said commission had nothing whatever to do with the contract of July 1, 1882, and reiterated that said commission was acting alone, under and by virtue of the provision of said Ch. 153 of the Acts of 1903. Thereupon appellant, by written communication under date of April 27, 1904, again called attention to the specific provisions of the contract of

July 1, 1882, by which the city had the right to acquire the plant and property of the Water Company, repeating its recognition of the right of the city to purchase said property, and after stating that it did not desire to place any obstruction in the way of the city acquiring said property, called attention to the then pendency of litigation between the city and the Water Company wherein the value of the plant and property of the Company was one of the most material questions to be determined by the special master appointed for that purpose, and stated that it was not the desire of the appellant to do anything that might prejudice the interest of either party to that suit, or which might be construed into an effort so to do, and concluded with an offer to meet the city authorities at the earliest practicable date to arrange the necessary details for an appraisal. This correspondence is set out in the bill.

Rec., pp. 14-17.

Upon these facts the Water Company insisted that it had done all that it could do under the circumstances to assist the city in acquiring its plant but the Water Commission reported to the City Council that it had been unable to obtain from appellant a written proposition for the sale of its plant, franchises, etc., to the city, and recommended that the city immediately take the necessary steps to submit to the electors of the city the question whether bonds should be issued to build an independent and competing plant, which had been estimated to cost by one Ford $656,483.00 and by one Hill $677,730.00; whereupon "immediately" the City Council ordered an election upon the question of the issuance of bonds to build a separate and competing plant, and said election having been held on July 9th, 1904, it was declared by the City Council that the issuance of bonds had been authorized by the necessary two-thirds vote, and an appropriation was made for the purpose of

securing plans and specifications for building said plant. The election commissioners refused to submit to the voters the question whether the city should purchase the plant of appellant, although as it is averred in the bill, a large number of voters were deluded into voting for bonds by the statement of those advocating their issuance, that such bonds could be issued either to purchase the plant of appellant or to construct an independent system, and having, as claimed by appellees, procured plans and specifications for the plant intended to be built, steps were taken to secure a contract for the construction of such plant.

Rec., pp. 17, 18, 19-20.

The methods pursued by appellees in preventing a submission to the voters of the city of the question as to whether or not the property of appellant should be purchased, and the manner in which the election was ordered and held, were specifically attacked in the bill, but inasmuch as these are matters which do not go to the vital question at issue between the parties, and which could be remedied by appellees retracing their steps and amending their course of procedure, it is not deemed desirable by appellant to set out the details of the bill upon this point or renew in this court its attack thereon in respect of these matters, but to secure a determination of the one question which is practically essential to a continuance of its business without ruin and bankruptcy resulting therefrom.

A system of water works owned and operated by the City of Knoxville would not be subject to taxation for any purpose. The plant of appellant was, at the time of the filing of the bill, assessed at $418,000.00 upon which municipal taxes alone, amounting to more than $5,000.00, were paid. If the city were permitted to build and operate its own plant, the Water Company would be discriminated against in the matter of taxes and

its property and business forced to aid in the operation of its rival's plant.

Rec., pp. 23-24.

The plant of the water works has been built in strict compliance with its contracts with the city, it is of sufficient capacity to meet the needs of the city and its inhabitants and covers the entire ground within the city where there is any demand for a water supply and the company is able and willing to continue to comply with its contracts in every respect and to furnish all the water, at reasonable prices, needed by the city and its inhabitants.

Rec., pp. 20-25.

Though the Water Company is compelled under its contract to erect all the hydrants which the city may need, and is ready so to do, yet the city, having ordered of the company only two hundred and fifty long since erected, is about to erect some 575 hydrants upon the pipes and mains of the plant devised by said Ford.

Rec., p. 21.

That said Water Company had, under its charter and several contracts with the city, the exclusive right to provide water to said city and its inhabitants and that, relying on such right, its plant was built at a cost of several hundred thousand dollars; that its stock was subscribed and paid for and its bonds, amounting to $665,000.00, but comprising only a part of the cost of the plant, were sold to persons subscribing, purchasing and paying for the same, upon the faith of such exclusive right and with the distinct understanding that should the city within the period covered by said contract of July 1st, 1882, desire to own and operate a water plant, it would acquire

the plant and property of appellant at its fair value, to be determined by appraisal under said contract.

Rec., pp. 20-21.

That the declared purpose of the city was to build an independent competing water plant and that it was endeavoring to secure a contract with some person, firm or corporation to build such plant and to issue therefor its bonds, claimed to be authorized as the result of said election of July 9th, 1904, and that the result of such action upon the part of the city would be the practical confiscation of the plant and property of the Water Company and work irreparable loss and injury to said company.

That the building of such competing plant by the city will result in appropriation of its charter rights and franchises without due process of law.

That chapter 153 of the Acts of 1903 of the State of Tennessee and the doings of the appellees thereunder, as hereinbefore set out are invalid, not only because in contravention of the Constitution of the United States in that, thereby the obligations of the contract between the Water Company and the city were impaired, but also the property and franchises of the company would be taken without due process of law and said company deprived of the equal protection of the laws.

Rec., pp. 22, 24, 25.

Upon the foregoing facts, appropriate relief was prayed.

THE DEMURRER.

The grounds of the demurrer filed by defendants in the Court below were, in substance, as follows:

1st. The Court was without jurisdiction of the suit.

2nd. The bill, with its exhibits, does not show that the defendants have in any way impaired the obligations of the

contract rights of the Water Company, or have deprived, or will in any way deprive, said Company of its property and franchises without due process of law, in contravention of the Constitution of the United States and the 14th amendment thereto.

3rd. The bill fails to allege any fact or facts which show that the city and the Water Commission have done, or intend to do, or commit, any act which will impair the obligations of any contract between the city and the Water Company.

Rec., pp. 84-85.

THE OPINION OF THE CIRCUIT COURT.

The opinion of the Court below is, in brief, as follows:

(1) That the jurisdiction of the Court was clear.

Rec., pp. 86-87.

(2) That no other reasonable or just interpretation could be put upon the contract of July 1st, 1882 (if it had been made between individuals), when construed in the light of the circumstances under which it was made, than that the city thereby contracted not to erect and maintain water works on its own account during the running of said contract and that it could hardly be doubted that it was understood by both parties that the city would not engage in an enterprise which would come in direct competition with the Water Company's plant and business during the period covered by said contract.

Rec., pp. 90-91.

(3) That the legislature of the state had not in a franchise grant (that is the charter), made the use and occupation of the streets exclusive for a term of years, nor expressly authorized the city to do so, and that therefore the city was without authority to grant an exclusive right or franchise in its streets.

(4) That the city, being without legislative authority to make easements and privileges in its streets exclusive, even by express stipulation, was without power to confer upon the Water Company the exclusive right to furnish water to the city and its inhabitants, even during the period covered by the contract of July 1st, 1882, as claimed by said Water Company.

DECREE.

Under this opinion a decree was entered overruling the first ground of demurrer, sustaining the second and third grounds, dismissing the bill and refusing a continuance of the restraining order which had been allowed when the bill was filed.

Rec., pp. 94, 95, 100, 101.

ASSIGNMENT OF ERRORS.

1. The Court, being of the opinion (Rec., pp. 90-91) that no other just or reasonable interpretation could be placed upon the contract of July 1st, 1882, than that the City of Knoxville thereby intended to bind itself not to erect and maintain works on its own account, or in any way enter into competition with the plant of the Water Company, during the running of said contract, **erred** in not holding and decreeing that appellee, Mayor and Aldermen of the City of Knoxville, was bound by said contract not to erect and maintain a water plant to be operated in competition with property of appellant prior to August 1st, 1913.

2. The Court erred in not holding that the appellee, City of Knoxville, by said contract of July 1st, 1882, and the amendments thereto, estopped itself from building or attempting to build a system of water works during the life of said contract and in not holding that appellee city had bound itself to carry out said contract in good faith and in accordance with the in-

tention of both parties thereto, as found by the court, that is, that appellant should have the exclusive right to furnish water to appellee city and its inhabitants until August 1st, 1913, unless sooner the city should purchase the plant built for it under the right reserved in said contract.

3. The Court erred in not holding that, under and by virtue of the charter of the Knoxville Water Company and of the Lonsdale-Beaumont Water Company and the several contracts between said companies and the City of Knoxville and the towns of North and West Knoxville, with the amendments thereto, as exhibited with and made a part of the bill in this cause all of which were ratified and approved by the General Assembly of Tennessee, by an Act passed January 29th, 1903, and known as Ch. 12 of the Acts of 1903 (Rec., pp. 71-74), there was conferred upon appellant, Knoxville Water Company, an exclusive franchise in the streets of appellee, City of Knoxville, and the exclusive right to furnish water to said city and its inhabitants during the continuance of said contracts.

4. The Court erred in not holding that chapter 153 of the Acts of 1903 (Rec., pp. 74-80), and the doings of appellees thereunder, looking to the building of a system of water works to be operated in competition with the plant and business of appellant, are in contravention of the Constitution of the United States, Art. 1, Sec. 10, in that thereby are impaired the charter rights and franchises of appellant and the obligations of the contract of July 1st, 1882, and the amendment thereto of October 20th, 1899, Exhibits 3 and 8 to the bill (Rec., pp. 34-41, 66-70), and of the North and West Knoxville contracts, Exhibits Nos. 5 and 7 to the bill (Rec., pp. 44-53, 58-66), and also in contravention of the Fourteenth Amendment to said Constitution, Section 1, in that, thereby, appellant is deprived of its liberty and property without due process of law and denied the equal protection of the law.

BRIEF AND ARGUMENT.

We respectfully submit to Your Honors that the learned Judge, before whom this case was tried in the court below, wholly failed to distinguish between the franchise rights or easements of appellant in the streets of the City of Knoxville and the mutual or reciprocal rights, obligations and duties of both appellee city and appellant Water Company under the contracts between them and erroneously concluded that the obligation of appellee to refrain from constructing and operating water works on its own account was dependent upon the exclusive character of appellant's franchise rights or easements in the streets, and, being of the opinion that appellee city was without legislative authority or power "to make easements and privileges in the streets and alleys of the city exclusive (even) by express stipulation," held, in effect (Rec., pp. 90, 91), that appellee city was not bound to observe, but might breach with impunity, its contract upon which "no other reasonable or just interpretation could be put" than that thereby the city had agreed not to erect and maintain water works in competition with appellant, during the life of said contract.

The learned Judge also confused the charter of appellant with that of a street railroad company, and fell into the inaccuracy of saying (Rec., p. 90), that while in Tennessee **a public service corporation like appellant** must and does obtain its corporate franchises from the state, yet it **deals by contract** with the municipality in obtaining its permission to the use and occupation of its streets. If by this it was meant that the rights of way or easements in the streets of the City of Knoxville arose and grew out of its contract with said city, dated July 1st, 1882, the error is manifest from a mere examination of the charter of appellant. The rule stated by the learned Judge applies to street railroad companies who can not obtain

a franchise or right of way in the streets of a municipality until an ordinance has been passed granting the right and specifically designating the route. **But appellant derived not only its corporate franchises but also full authority to enter upon and occupy the streets of appellee from the State, through its charter, and not from the city by contract.** It is true that before said charter could be granted it was necessary to obtain from the corporate authorities leave to operate thereunder in the said city, and this was done without condition, restriction or limitation, as shown by the endorsement of such consent on the charter itself. (Rec., p. 31); nevertheless, the Act under which the Water Company was chartered clearly shows that its rights of way and easements in the streets of said city were, by the state, conferred upon and directly vested in said company through its charter, upon acceptance thereof. And such is the rule in Tennessee, unless the contrary is plainly shown.

Railroad vs. Adams, 3 Head, 597.

Citizens St. Ry. Co. vs. Africa, 100 Tenn., 83.

While we are of the opinion that the rights of way or easements of appellant in the streets of said city were, in practical effect, and by necessary implication, exclusive for a period of thirty (30) years, nevertheless, from the view we take of the case, the granting of the relief sought by appellant is not dependent upon either its franchises or easements in the streets being exclusive, or the power of the city to grant an exclusive right of way or easement in the streets; but, because it is helpful to a correct understanding and interpretation of the contract between the parties to bear in mind the fact that appellant's authority to enter upon and rights in the streets emanated directly from the State, we have thought proper to correct the inaccuracy into which the Judge fell by confusing the charters of two separate corporations and therefore we invite the attention of the Court to the difference between the

Acts authorizing the incorporation of water companies (Appendix B) and street railroad companies (Appendix C).

And now, without regard to the question as to whether an exclusive right of way or easement in the streets of appellee city was conferred upon appellant by its charter, or whether said city had legislative authority to grant an exclusive right of way or easement in its streets, the contention of appellant, briefly stated, is:

1. **That on July 1st, 1882, a contract was entered into between appellant and appellee city, whereby, in consideration of the agreement of appellant to build and maintain for a period of thirty (30) years a system of water works sufficient to supply said city and its inhabitants with water for fire protection, public, sanitary and domestic purposes, appellee city agreed and bound itself not to erect and maintain, in competition with appellant, a system of water works to supply itself and its inhabitants with water, during the continuance of said contract.**

In support of this proposition, we respectfully insist:

(a) It was the right and duty of appellee city to contract for a supply of water both for itself and its inhabitants, and appellant was fully empowered to provide such supply and contract with the city therefor.

(b) No reasonable or just interpretation can be placed upon said contract, in the light of the circumstances under which it was made, than that the city by necessary implication agreed thereby not to erect and maintain water works on its own account, in competition with appellant during the life of said contract.

(c) That if the city desires to engage in the business of furnishing water to itself and its inhabitants prior to August 1, 1913, good faith requires that it, under and by virtue of the

right reserved in said contract, shall purchase the plant and property of appellant.

(d) Even if at the time said contract was executed appellee city lacked legislative authority to enter into an agreement conferring the sole right and authority upon appellant to furnish water to said city and its inhabitants for a period of thirty years, said appellee city is now estopped to set up and plead any such supposed want of authority, and, moreover, since said contract was entered into, not only has full authority been conferred upon said city by the legislature in respect of the subject matter of said contract but said contract has been expressly recognized and approved by the Legislature of Tennessee (Acts of 1903, Ch. 12), and appellee authorized to consummate its rights thereunder by a purchase of the plant and property of appellant.

2. That this is not a case where a contract is sought to be implied with a municipality from a mere grant or license to do business therein, but one seeking to enforce the reasonable and plain meaning, and to prevent the impairment of, a contract actually entered into, within the power and authority of both parties.

We submit that the questions involved are ruled by the holding of this Court in the case of Walla-Walla Water Co. vs. Walla-Walla, 172 U. S., 1, and that the case on its facts is distinguished from the cases relied upon by the learned Judge (Rec., pp. 89, 92) to support his decision—which cases, however, as we shall endeavor to show, are not only plainly distinguishable on their facts from the one at bar, but in their reasoning support the contention of appellant.

I.

Both the City and the Water Company were fully empowered to execute the contract of July 1st, 1882.

AS TO THE POWERS OF THE CITY.

We submit that it is not only one of the ordinary powers of a municipal corporation to furnish a supply of water for itself and its inhabitants, either by the erection of a municipal water system, or by contracting with other persons, companies or corporations for such supply, but that such authority is to be found among the powers expressly conferred upon the City of Knoxville at the time it entered into the contract of July 1st, 1882, as shown by the excerpts taken from the various acts of the General Assembly of Tennessee incorporating and conferring powers upon the City of Knoxville, set out in "Appendix A." An examination of these statutes shows that the city had been authorized, among other things, to receive and hold property, real and personal, for the erection of water works and other public purposes, and do all acts touching the same as natural persons; to make regulations to secure the general health of the inhabitants; to provide the city with water by water works within or beyond the boundaries of the city; to provide for the prevention and extinguishment of fires; and to do all things and to pass all ordinances not contrary to the constitution and laws of the State that might be necessary to carry out the full intent and meaning of said acts; and to accomplish the object for which said City was incorporated.

In view of these powers expressly conferred upon said city it would seem unnecessary to cite authority in support of the proposition that thereby the city was fully empowered to furnish and provide a water supply for itself and its inhabitants, either by building municipal works or contracting with others therefor. However, looking to the authorities, we find the proposition contended for amply supported.

As respects the implied authority of a municipal corporation to procure a supply of water, such power has been held to be implied from the grant to a municipal corporation of the

power to make all contracts which may be deemed necessary for the general welfare, or to provide means of extinguishing fires.

In **Rome vs. Cabot, 28 Ga., 50,** under authority to make contracts for the general welfare, it was held that the city had the right to make contracts for the construction of water works.

In **Livingston vs. Pippin, 31 Ala., 542,** it was held that the city council, having power to provide for ordinary expenses of the town, had power to procure a supply of water in a public square, and were themselves the judges of the mode best calculated to accomplish that object, on the ground that nothing was more important as a sanitary and police regulation than an abundant supply of water.

The power to contract for a water supply is necessarily involved in the general welfare of the municipality, and need not be expressly granted to it in its charter by specific words. This power has been implied from the grant of the right to prevent and extinguish fires, or to provide for the general health and welfare of the city.

Hardy vs. Waltham, 3 Met. (Mass.), 163.

Webb City Water Works Co. vs. Webb City, 78 Mo. App., 422.

Aurora Water Co. vs. Aurora, 129 Mo., 540.

In **Lake Charles, etc., Co. vs. Lake Charles, 106 La., 65,** it was held that even if no provision therefor is made by statute, a city has implied power to contract for water.

While it is well settled that a municipal corporation possesses, and can exercise, only those powers expressly granted, or those necessarily or fairly implied in or incident to the powers expressly granted, and when there is any fair, reasonable doubt concerning the existence of power such doubt is to be resolved against the corporation, nevertheless it is equally well settled that the fundamental and universal rule, which is

as reasonable as it is necessary, is, that the construction to be placed upon the legislative grant is to be just, seeking first of all for the legislative intent in order to give it fair effect. Further, the rule of strict construction of corporate powers is not so strictly applicable to the ordinary clauses in the charters of incorporating acts of municipalities as it is to the charters of private corporations.

Dill., Mun. Corp. (4th Ed.), Secs. 89, 91.

In Tennessee, the rule is thus stated:

> A corporation exists alone by virtue of its act of incorporation and it can exercise no powers but such as are the result of necessary or proper implication. The powers of a corporation being exercised, then, under delegated authority, are to be strictly construed. * * But this construction has never confined the execution of the power to the word and letter, but everything necessary and **proper** for carrying into execution the granted powers has always been conceded by the strictest constructionists.
>
> **Nichol vs. Nashville, 9 Humph., 261-2.**

These principles were applied by the Supreme Court of Tennessee in the case of the **City of Memphis vs. Memphis Gayoso Gas Co., 9 Heisk., 530, 537, 538,** to authorize the City of Memphis, empowered by its charter "to purchase and hold real estate for gas works, and to do all things a natural person might do touching the same," to procure a supply of gas by subscribing for stock in a gas company.

In this case, in the course of its opinion, the court said:

> **"The preservation and protection of the lives and property of the citizens of the city are leading objects for which a charter is granted, and the charter of Memphis distinctly recognizes the use of gas in furnishing light as a legitimate mode of effectuating these**

objects. There is no express power in the charter to buy gas with which to light the city, nor any express power to erect works and manufacture it, but if the agents of the corporation regard either of these modes of getting and supplying the gas as necessary and proper, they have the implied power to so procure a supply. * * * In the case of Nichol vs. Nashville, 9 Humph. (Tenn.), 270, Judge Turley said: 'If a corporation may make the road (referring to a steam railroad) may it not join with others to make it? If the undertaking be too expensive to be carried into execution by a corporation itself, or if others be desirous of uniting with it for the effectuating of the design, why may they not unite? Again, it may be asked, is there anything wrong in this? Is there anything against the public good in this? Is there anything against the law in this? Surely not.'

"In like manner, we may ask, Why is it that if the corporation has not money or credit enough to erect works and make gas, which it could lawfully do, it may not use the money or credit it has to enable a company to form and manufacture gas? Does the charter authorize the corporation to use money or credit enough to build gas works entire, and yet it has not power to use enough of its money or credit to build them in part, or to aid others in building them? Is it less lawful to get gas by contributing part of the means necessary to produce it, than to contribute the whole? There can be but one answer to these questions. **Whenever the lighting of the city with gas is found to be a corporate purpose, then, upon the strictest construction of the powers of corporations, everything necessary and proper for carrying into execution the granted powers may be lawfully resorted to.**"

We submit that if a municipal corporation may lawfully lend its credit to, or subscribe for stock in a public service corporation, for the purpose of securing a supply of gas or water,

upon what principle can it be urged that it is unlawful or beyond its just powers to purchase such supply of gas or water, and having paid a reasonable price therefor, incur no further or other liability such as might result either from extending its credit or becoming a stockholder in such public service corporation.

In the language of Judge Turley, "Is there anything against the public good in this?"

It will be noted that among the express powers conferred, the City of Knoxville was not only authorized to receive and hold real estate for the erection of water works, and do all things touching the same as a natural person, but also to provide the city with water works within or beyond the boundaries of the city—to make regulations to secure the general health and to provide for the prevention and extinguishment of fires.

Calling the attention of Your Honors to the contract itself (Rec., pp. 34-41), it will be found that it is entitled, "**Articles of agreement for the construction of water works for the City of Knoxville,**" and that its purpose was and is to supply said city and its inhabitants with water for fire protection and public sanitary and domestic purposes, thus covering and responding to the specific powers enumerated above. How, we ask, could the city provide for the prevention and extinguishment of fires or make proper and adequate regulations to secure the general health of the inhabitants of the city except by and through a supply of water which it was unable to furnish except by contract with appellant?

The learned Circuit Judge, in his opinion (Rec., p. 92), cited the case of **Memphis vs. Memphis Water Co., 8 Baxt., 589,** upon a proposition, which as a general rule admits of no doubt, but this case, decided in 1876, and before the contract between the city and the Knoxville Water Co., was entered into, is ex-

press authority for the proposition that a municipal corporation may lawfully contract for a supply of water.

The questions involved in this case were as follows: The Supreme Court of Tennessee had held (City of Memphis vs. Memphis Water Co., 5 Heisk., 594), that said Water Company, under a *legislative* charter, had an exclusive franchise or privilege to furnish water to the City of Memphis for a period of 25 years. This decision was in 1871. As a consideration for such exclusive privilege it was provided in section 10 of the charter of said company that "said company shall furnish water to the City of Memphis sufficient to supply the public offices, police stations, hospitals and engine house and for extinguishing fires, free of charge;" but in January, 1872, the city and the water company entered into a contract by which the city subscribed for one thousand shares of the capital stock of said company and undertook to rent from the water company a large number of hydrants at certain stipulated prices, and these hydrant rentals aggregated between $30,000 and $40,000 per annum. The court held:

1. That under its charter, it was the duty of the water company to furnish free of charge, all water necessary for the extinguishment of fires, etc.

2. That the water company being invested with the exclusive privilege to supply said city and its inhabitants with water, the city was prohibited from supplying itself and its citizens with water, and therefore being without power to provide such supply, was without authority to contract therefor. Upon this last point the court said:

> "If there had been by the charter (of the water company) no inhibition upon the city to supply water, **but that natural duty** had been left still imposed on the officers of the city corporation, then, as in the **Gayoso Gas Co. case**, decided at the last term, the city might,

for such necessary corporation purpose, have contracted for the supply of water."

Memphis vs. Memphis Water Co., 8 Baxt., 587-9.

The learned Judge also cited (Rec., p. 92), the case of **Railroad Co. vs. Memphis, 3 Shannon's Tenn. Cases, 193,** but, with all respect, we submit that not only were the facts involved in that case different from those in the case at bar, but if the holding of the court bears at all upon the questions before Your Honors for determination, the necessary implication therefrom is favorable to the contention made here on behalf of appellant.

The actual point decided in that case was, that where a charter of a railroad company was on condition that it should secure the consent of the City of Memphis before it could be entitled to or exercise franchises or easements in the streets of such city, said railroad company had no rights or franchises in said streets without such consent. Speaking for the Court, Special Judge Howell E. Jackson, afterwards an honored member of this Court said:

> "It was conclusively settled in the Supreme Court of this State and of the United States, in the cases of Memphis City Railroad Co. vs. Mayor, etc., 4 Cold., 405, 413, 416, and People's Passenger Railroad Co. vs. Memphis Street Railroad Co., 10 Wall. (U. S.), 38-55, that said corporation, the People's Passenger Railroad Co. of Memphis, never procured or obtained the city's consent to its use of any of the streets for the purpose of operating street railways thereon, as provided by the fourth section of the act of incorporation, and by the resolution of the Board of Mayor and Aldermen when permission was given for Small and his associates to procure said act (of incorporation.)"

Upon petition to re-hear being filed, the Court, speaking through Chief Justice Nicholson, said:

"The application for a rehearing rests upon the assumption that the city of Memphis entered into a contract with the adventurers, by which the city was bound to give its consent to the charter of the People's Passenger Railroad Company, when the same should be granted by the legislature, and would then consummate their contract for street railways with the company so chartered; and that the city violated this contract by refusing to consent to the charter when granted, for which violation the adventurers are entitled to damages. This question was considered and passed upon in the opinion already delivered; and it is only necessary now to say that, when the city agreed that the adventurers might procure a charter for the purpose of carrying out the contract made with the adventurers, the city expressly reserved the right to withhold its consent from the charter, and in the charter itself this right is reserved to the city; that the city did not give its consent to the charter was adjudicated in this court and in the United States Supreme Court; and it is manifest, both upon the face of the ordinance permitting the charter to be procured, and upon the face of the charter, that the city was not bound to consent to the charter, but was left free to consent or not, when the charter should be procured. Its refusal to consent was, therefore, no violation of its contract, but was the exercise of a discretion expressly reserved. This was the holding of the court in the opinion already delivered, and we are satisfied with its correctness. The petition for rehearing is therefore dismissed."

We call the attention of the Court to the vital difference between the facts of this case and the one at bar. In that case the incorporators of the railroad company never procured the consent of the City of Memphis to the act of incorporation, which was made an express condition to the exercise of the franchises conferred by the charter on the railroad company.

In the case at bar, the record shows that it was also a condition precedent to the granting of the charter of the Knoxville Water Company that the consent of the municipal authorities should be obtained, and that leave to operate thereunder should be endorsed on the application for the charter. This was done, as hereinbefore stated, by the corporate authorities of the City of Knoxville, without condition, restriction or limitation.

WAS THE WATER COMPANY AUTHORIZED TO ENTER INTO SAID CONTRACT?

The answer to this question is found in the charter of the Water Company itself. (Rec., pp. 28-31). Prior to the Constitution of 1870, all grants of corporate franchises were by special acts of the legislature; but this was changed by that Constitution, which provided for the issuance of charters under general laws to be enacted by the General Assembly. The language of the Constitution (Art. 11, Sec. 8) is as follows:

> "No corporation shall be created, or its powers increased or diminished, by special laws, but the General Assembly shall provide by general laws for the organization of corporations hereafter created, which laws may at any time be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested."

The first act, under the Constitution of 1870, providing for the organization or incorporation of water companies, was chapter 104 of the Acts of 1877 (Appendix B), and under the authority of this act, and in the form therein prescribed, the Knoxville Water Company was incorporated, for the express purpose of supplying the City of Knoxville and its inhabitants with water, and for such purpose it was authorized to enter upon the streets and other public thoroughfares of the city to lay down its pipes and erect its works; and it was specially

authorized not only to bring a sufficient supply of water into the city to supply said city and its inhabitants with water, and to erect hydrants or fire plugs within said city, but also to contract with the corporate authorities of said city and its inhabitants for the use of said water, and charge such price for the same as might be agreed upon between said company and said parties. Therefore, it will be seen that the Water Company was not only chartered for the express purpose of supplying the city and its inhabitants with water, but there was conferred both upon it and the corporate authorities of said City, full power to make contracts for the use of said water and agree upon the charges therefor, reserving, however, to the city, under the second section of said act, power to regulate the rates and charges of the Water Company. If the city had not been authorized by and through its own charter, or had it not been invested with what the Supreme Court of Tennessee, **supra,** (8 Baxt., 589) termed a "natural duty" to contract for a supply of water, full power and authority would have been, and was in fact conferred upon the city to make such contract in and by the foregoing provision contained in the charter of the Water Company, because it is settled law in Tennessee that a power may be conferred upon a municipality by an independent act incorporating a private corporation.

Nichol vs. Nashville, 9 Humph., 258-265.

Further, we submit and respectfully insist that the question of the power of both parties hereto to make the contracts relied upon by appellant—their validity and exclusive character for a period of thirty years, have already been adjudicated, but this point will be more fully considered under another head.

II.

And now, having found that the City and the Water Company had full power and authority to enter into the contract of July 1st, 1882, let us see what the parties, thereby, intended to, and, in fact, did agree upon. We submit:

No other reasonable or just interpretation can be placed upon said contract than that the city thereby agreed not to erect and maintain water works on its own account, in competition with appellant, during the continuance of said contract.

Upon the construction of said contract, the learned Judge said:

> "In the ordinary case of a contract between individuals like the one here between the city and complainant I might be strongly disposed to hold that the city had contracted by necessary implication not to erect and maintain water works on its own account during the running of the contract with complainant; that is for the 30 year period. No other reasonable or just interpretation could be put upon this contract, in the light of the circumstances under which it was made.
>
> "The city had at that time been in a proper way considering the question of building a water works plant of its own, and had made certain preparations for that purpose by securing suitable parcels of land, or real estate.
>
> "In its contract with this complainant, the complainant was required to take and pay for that property, and it was accordingly conveyed to it, which obviously could signify nothing else than an intention on the part of the city at that time to abandon its own place of erecting or maintaining water works, in view of the contract made with the complainant.
>
> "To induce the complainant to expend its money and engage in the enterprise of furnishing the city and its inhabitants needed water, the city undertook

expresaly to protect the complainant in the enjoyment of its rights by a term or provision in the contract that it would not grant a similar right to any other person or corporation during the life of the contract. This desire to induce the investment of the capital and the purchase from the city of the real estate previously secured for the purpose of the plant, would obviously fail to afford protection if the city should itself, during the same period, erect and operate a water works plant of its own, and in that way come in direct competition with the complainant.

"It is hardly to be doubted that it was understood by both parties that the city would not itself engage in such an enterprise and in that way enter into direct competition with the complainant company during the contract. Such a view would, in effect, be no more than to require on the part of the city that it would act in good faith in relation to the contract with the complainant. Or, to state the proposition in the very language of the Supreme Court of the United States, in Walla Walla Water Co. vs. Walla Walla, 172 U. S., I:

" 'As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.'

" 'An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years.'

"In Tyrone Gas & Water Co. vs. Tyrone, 195 Penn., 566, it was declared by the court that competition, especially on the part of a municipality, is a virtual confiscation of property."

Rec., pp. 90, 91.

If the learned Judge was correct in his interpretation of the contract, and we insist that no other reasonable construction can be placed thereon, then, we submit, he was in error in refusing to enforce the provisions or to give effect to the intention of the parties as set out in said contract.

We have shown that the purpose of the contract was within the powers of the city, and we understand the law to be that a contract entered into within the authority of a municipal corporation, shall receive the same construction as though it had been entered into between individuals. The purpose of the contract was not to govern the inhabitants of the city, but to obtain a private benefit for both the city and its inhabitants—that is, the purpose was within the business and proprietary powers of the city, as distinguished from its governmental and legislative functions.

Illinois Trust & Savings Bank vs. Arkansas City, (C. C. A.), 76 Fed. Rep., 271.

Cunningham vs. City of Cleveland (C. C. A.), 98 Fed. Rep., 657, 663.

Western Sav. Fund Soc. vs. Philadelphia, 31 Pa. St., 175.

Bailey vs. New York, 3 Hill (N. Y.), 531.

Brumm's Appeal (Pa. 1886), 12 Atl. Rep., 855.

But before proceeding further with the discussion of this question, let us ascertain whether the interpretation placed by the Judge upon the contract can be sustained. It is a well settled canon of construction, applicable to the interpretation of contracts, that courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement, and place themselves in the situation of the parties who made the contract; view the circumstances as they viewed

them, "so as to judge of the meaning of the words, and of the correct application of the language to the thing described."

Goddard vs. Foster, 11 Wall., 123, 143.

Guarantee Co. vs. Mechanics Savings Bank & Trust Co. (C. C. A.), 80 Fed. Rep., 766, 778.

What was the situation of the parties? The city had long been charged with the duty of supplying itself and its inhabitants with water, and about the year 1880 took some preliminary steps towards performing such duty, by purchasing certain real estate and procuring a full set of plans for a water plant sufficient to supply itself and its, then, ten thousand inhabitants. Having gone thus far, it became apparent to the corporate authorities that the building and maintenance of a plant sufficient to meet the demands of the city and its inhabitants would involve a much larger sum than the city could safely assume, in view of the risks and uncertainties incident to such pioneer venture, so that, it was determined that the interests of the city and its inhabitants would be best subserved by procuring a water supply through a plant to be built by some individual, company or corporation, who would agree to give the city the right to purchase such plant at some time to be agreed upon, and therefore the Water Company was chartered for the express purpose of meeting this situation, and its bid, or proposition, submitted in competition with the bids and propositions of other persons, was accepted by the city, and in due time a formal contract was entered into, which is known in this record as the contract of July 1st, 1882, and is entitled "Articles of Agreement for the construction of water works for the City of Knoxville." By this contract, among other things, the Water Company agreed:

To erect and establish on the land acquired by the city for that purpose and in accordance with plans procured by the

city, a system of water works sufficient to supply said city and its inhabitants with water for all the purposes therein stipulated, that is, fire protection, public, sanitary and domestic purposes.

To purchase from the city at the price of $7,800.00, the property, plans, maps, etc., which the city had theretofore acquired for the purpose of erecting water works on its own account.

To erect, at certain points designated by the city, a certain number of fire hydrants, and afterwards as many additional hydrants as the necessities of the city might require.

To furnish free of charge (except hydrant rental) water from such hydrants for flushing the sewers and gutters, and for all purposes of the fire department, city hall buildings and office and persons therein.

To provide private consumers with water at not to exceed a certain maximum rate.

Thus all the purposes for which the city and its inhabitants might require water were covered, and in order that there might be no uncertainty in regard to the continuing obligation upon the part of the company, it was further expressly stipulated that it should maintain said water works in such condition as may be sufficient and necessary to enable it to comply with all of its undertakings set out in said contract, for a period of thirty years from January 1st, 1883, unless the city should become the owner of said water works within that period in the manner provided in said contract; and to prevent an excessive encumbrance of said plant with bonds which might pass into the hands of innocent holders, and thereby complicate or embarrass the city's reserved right to purchase, it was further agreed that the Water Company would so amend its charter as to limit its bonded indebtedness to $150,000.00.

Rec., pp. 35, 36, 37.

Now, it will be observed, that the city was to have water free of charge, except hydrant rental, for every possible corporate purpose, and it agreed to pay fifty dollars per annum for each hydrant erected under such contract, and the company was required to so lay its pipes and mains that they would be sufficient to support all the hydrants which the necessities of the city might require. Thus was covered and provided for, every municipal purpose. In addition to this, it expressly agreed and bound itself not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville or the inhabitants thereof, for the full period of thirty years from the first day of August, 1883, provided the Water Company should comply with the requirements and obligations imposed upon and assumed by it under and by virtue of said contract. (Rec., p. 37.)

In addition to this it was also agreed that at any time after the expiration of fifteen years from the first day of August, 1883, that is, the date fixed for the completion of said water works, the city should have the right to purchase all of the property, rights, franchises and privileges belonging to the Water Company, or growing out of said contract, at a price to be agreed upon between the parties by negotiation, and, if the parties could not agree in regard to the price, at a price to be fixed and determined upon in an eminently fair and just manner by appraisers, in a manner specifically provided in the contract.

The water system provided for in this contract has been, at the cost of many hundreds of thousands of dollars, built and maintained by the Water Company, and its stock has been subscribed and bonds purchased upon the belief and with the understanding that the city, by said contract, intended to agree and bind itself and had agreed and bound itself, not to erect and maintain a water plant in competition with the plant and

property of appellant, prior to the first day of August, 1913, unless before that time the city, desiring to resume its natural duty of supplying water to itself and its inhabitants, exercised the right of purchasing the plant and property of appellant as provided in said contract.

Now, what was the intention of the parties in entering into this contract? Can it be supposed that either this Water Company, or any other company or person, could have been induced to enter into the undertakings imposed upon it by said contract, unless it was certainly understood that thereby the city would not enter into competition with the plant which was in effect being erected for it? The contract covers every possible use for which the corporate authorities of the city could require, and obligates the Water Company to maintain its works in such condition as may be sufficient and necessary to enable it to comply with all of its undertakings for a full period of thirty years, unless the city should purchase such water works within that period, under the right reserved to it by and as a part of said contract. Can it be supposed that the Water Company could be required to keep its plant in such condition as to enable it to furnish to the city free water, for the many purposes stipulated, for a full period of thirty years, and at the same time the city operate a rival plant?

We submit that these questions carry their own answers, and that, as stated by the learned Judge, "It is hardly to be doubted that it was understood by both parties that the city would not engage in such an enterprise and in that way enter into direct competition with" appellant, and that no other reasonable or just interpretation could be placed upon this contract, in the light of the circumstances under which it was made.

The obligations of the parties to the contract of July 1, 1882, are correlative.

It is no answer to the interpretation of the contract of July 1, 1882, insisted upon by appellant, that the agreement or covenant to erect and **maintain** for a period of 30 years water works of sufficient capacity to supply the city and its inhabitants with water for fire protection, and public, sanitary and domestic purposes, is found among the agreements or covenants of the Water Company.

For what purpose were such works to be maintained? The inevitable answer from the contract itself is that they were to be maintained for the sole purpose of furnishing a sufficient supply of water to the city and its inhabitants for all purposes. Hence, we insist that, by necessary and inevitable implication, there arises out of the terms of said contract a correlative obligation on the part of the city, to do that which is necessary to enable the Water Company, so bound, as far as possible, to fulfill its part of the contract. Would it not be the limit of folly to suppose that the Water Company would or could maintain its plant for a period of thirty years, or for any lesser time, unless its water should be purchased by the City of Knoxville and its inhabitants? It is well settled that although a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations, when that is necessary to carry out the intention of the parties and prevent the contract from being ineffectual.

Churchward vs. Queen, L. R., 1 Q. B., 173.
Barton vs. McLean, 5 Hill, 256.

Or, as in the case of Manistee Iron Works Co. vs. Shores Lumber Co., 92 Wis., 21, the rule may be stated as follows:

> "It is a well known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; that, where a contract is so framed that it binds the party contract-

ing to do the act, it will imply a correlative obligation on the other party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract."

Del. & Hudson Canal Co. vs. Penn. Coal Co., 8 Wall., 288.

The use of the word "exclusive" would have added nothing to the contract of July 1st, 1882.

It was earnestly argued in the Court below that the failure to expressly name the city in its second covenant (Rec., p. 37) whereby it obligated itself not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville, or its inhabitants, within the thirty year period and the absence of the term "exclusive" from the contract, is conclusive that it was not intended thereby to confer upon the Water Company the exclusive right or privilege of selling water to the city, or, to put it differently, that it was not intended to exclude the city during said period of thirty years from furnishing itself and its inhabitants with water.

We had not understood that there was so much magic in the word "exclusive." The city had not only provided for every municipal purpose, but had forced the Water Company to purchase and use in aid of that purpose the very property which the city had acquired and had intended to devote to that use. It had acquired the right to purchase the plant which in effect, as stated in the title of the contract, was constructed for it—it prohibited the company from assigning its contract or transferring its plant, and placed a limitation upon the encumbrances which might be lawfully placed thereon, so that when it became ready to assume the duty of furnishing a supply of water to itself and its inhabitants by the acquisition of the plant built for it and under its directions, it could exercise such power without embarrassment from innocent holders of large quantities of bonds. And not satisfied with all these indicia of practical ownership, the city, to give the fullest

credit to the Company in the erection of its plant, further agreed that it would not grant to any other person or corporation, any contract or privilege to furnish water to itself or its inhabitants during the continuance of said contract. We submit to Your Honors that this provision may be of no practical importance whatsoever, **except to place beyond doubt—to render the conclusion inevitable—that the city intended to exclude any possible idea that water could be furnished to the city and its inhabitants, during said thirty year period, by any person, company or corporation save appellant.** We say that it may be of no practical importance or benefit, save to indicate an exclusive right in appellant, because it is manifest that no individual or company, or other private corporation, could be found who would undertake to build and enter into competition with a water company in a town of ten or fifteen thousand inhabitants, where the plant and equipment already built and in operation was sufficient to supply the needs of the city and its inhabitants for water. Argument is not needed to demonstrate this proposition. Therefore we insist that it is manifest, taking all of the provisions of the contract and viewing them in the light, and from the situation, of the parties thereto when the same was executed, that it could not have been supposed by the parties thereto that the use of the term "exclusive" would have added anything whatsoever to the meaning, or strengthen the intention, of the parties.

Implied obligations must be enforced as well as those expressed.

It is a well settled fact that the law implies duties and obligations in a contract other than those which are expressed, and the implied duties and obligations are as much a part of the contract as those expressed. Or, to express it differently, what is implied in a statute, pleading or contract, is as much a part of it as what is expressed.

U. S. vs. Babbit, 1 Black, 55.
Massachusetts vs. Rhode Island, 12 Peters, 123.
Union Depot Co. vs. Chicago Ry. Co., 113 Mo., 213.

On this same point Mr. Parsons in his great work on Contracts (8th Ed), 515, says:

> "The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications, the want of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication if the parties had been silent. The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make the express provision, the reason of the implication fails."

We insist that in this case we are not driven to the necessity of asking the court to imply a contract binding upon the city or obligating it not to construct works on its own account to compete with those of appellant. It is only necessary to enforce the plain, express provisions of this contract, and the fair, reasonable and even necessary legal implications therefrom. We only ask that the city be required to do in good faith what, as found by the Circuit Court, both parties distinctly understood was being agreed upon in said contract, and, in the language of the court in Los Angeles Water Co. vs. The City of Los Angeles, 103 Fed. Rep., 711:

> "It is occasionally well to recall the fact that there is no more reason to permit a municipal corporation to repudiate its solemn obligations, entered into for value, than there is to permit an individual to do so. Good faith and fair dealings should be exacted of the one equally with the other."

FEDERAL CASES BEARING UPON THE QUESTION.

This case, we again submit, is ruled by the decision of this court in Walla Walla Water Co. vs. Walla Walla, 172 U. S., 1. And because of its tremendous importance to appellant, the court will permit us again to call the attention of Your Honors to both the facts of the case and the holding of the court thereon:

The charter of the City of Walla Walla empowered it to erect and maintain water works, or to authorize the erection of the same, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, and by another section the city was empowered to provide a sufficient supply of water and, "to grant to use the streets of the city for the purpose of laying gas and other pipes, to any person or association of persons for a term not exceeding twenty-five years: provided, always, that none of the rights or privileges shall be exclusive, nor prevent the city from granting the same rights to others." Under this statute the city by ordinance granted to the Water Company the right to lay and maintain water mains, etc., for twenty-five years, reserving to itself the right to maintain fire hydrants and to flush sewers during this term each without charge. The contract further provided that it was voidable by the city so far as it required the payment of money upon the judgment of a court of competent jurisdiction, when there should be a substantial failure of the supply of water, or failure of the company to perform its undertaking. The provisions of the ordinance were accepted by the water company and the works were erected, and the company for a number of years supplied the requisite water, and performed its contract. Then the city passed an ordinance to construct its own system of water works and to issue bonds therefor. Thereupon the Water Company filed its bill to enjoin the city. It is true that in that case the ordinance creating the contract be-

tween the city and the Water Company undertook to give the company the exclusive right to furnish water. And while it might seem on a casual reading of the opinion of the court that this fact had some influence on its judgment enjoining the city from becoming a competitor with the Water Company, yet a closer analysis of the opinion shows that this fact could not have been of controlling effect. Such a provision in the contract being in express violation of the grant under the state statute to the city, the statute read the provision out of the contract, and therefore the case necessarily was determined without regard to such provision. This case decides expressly that the subsequent ordinance of the city brought the case within the purview of that clause of Section 10, of Article 1, of the Federal Constitution, which prohibits a state from passing any law impairing the obligation of contracts. The municipality being an integral part of the state, its legislative act in the form of an ordinance, under an assumed authority from the state, operated upon the previous contract the same as if it had been a subsequent act of the State Legislature. The court said:

> "Had the privilege granted been an exclusive one the contract might be considered objectionable upon the ground that it is a monopoly, without an express sanction of the legislature to that effect."

It then further proceeded to hold:

> "That an ordinance granting the right to the Water Company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of the city with water, does not, in our opinion, create a monoply or prevent the granting of a similar franchise to another company."

And as conclusive proof that the court did not base its conclusion upon the provision of the contract giving the company the exclusive right for the designed period, the court said:

"There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own, was accompanied, in Section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. Taking Sections 7 and 8 together, they amount simply to this, that if the city should desire to establish water works of its own, it would do so by condemning the property of the company, and making such changes in its plans, or such additions thereto, as it might deem desirable for the better supply of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract. **As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.** An agreement of this kind was a natural incident to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons, for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power house, and the laying of its pipes through the streets and as the life of the contract was limited to twenty-five years it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it would undoubtedly have become the master,—and practically extinguish the rights it had already granted to the

company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

Walla Walla vs. Walla Walla Water Co., 172 U. S., 17.

This decision, as we understand the Court to have repeatedly said, is still the law of the land. It is recognized in every subsequent holding of this court upon the question. It was followed in the case of Vicksburg Water Company vs. City of Vicksburg, 185 U. S., 65-82, where the jurisdiction of this court was sustained to protect a contract similar to that involved in this case—a contract not stronger or clearer in meaning than the one at bar, although the term "exclusive" appeared therein.

The other cases wherein water companies were denied relief from municipal competition, are generally cases where no express, definite, contract providing a supply of water for a given period was involved, but where it was sought to raise a contract by implication from a mere grant of a franchise or right to do business within the municipality.

In the case of Stein vs. Water Company (1891), 141 U. S., 67, it was held that a right to take water from a particular source was not exclusive of other and different sources.

In Hamilton Gas Light & Coke Co. vs. City of Hamilton (1892), 146 U. S., 258, it was only decided: 1. That the contract between the city and the Gas Light Company had expired before the city undertook to build its own plant.

Note: In this case the contract will not expire until August 1, 1913.

2. That under the constitution of Ohio, the legislature had the right to amend the charter of the Water Company, so

as to repeal the exclusive character of the grant therein contained.

Note: There is no claim made in this case, nor could such a claim be made, that the charter of the Water Company has been in any manner repealed or amended. Under the constitution it could only be done by a general statute.

In Long Island Water Supply Co. vs. Brooklyn (1896), 166 U. S., 685, it was held that the exclusive right to supply a town with water, is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply the privilege of laying its mains in the streets, and contained a covenant on the part of the town to pay certain hydrant rentals, without words of exclusion either express or by necessary implication.

In Bienville Water Supply Co. vs. Mobile (1899), 175 U. S., 109, the contention of the water company was decided against it on the ground that it did not claim an exclusive right —that the city had not contracted for it for the purpose of procuring a water supply for its inhabitants, and because the city was not refusing to comply with its contract to take water from said Bienville Company for purpose of fire protection.

In Bienville Water Supply Co. vs. Mobile (1901), 186 U. S., 212, between the same parties as in 175 U. S., 109, the contention was made by the water supply company that it did have an exclusive right, but the Supreme Court of the United States held against it on the ground that under the constitution of Alabama the Legislature itself, of that State, had no power to create a monopoly, or to confer an exclusive grant.

Note: But the Supreme Court of Tennessee, in the case of Memphis vs. Memphis Water Co., sustained an exclusive grant to the water company for a period

of twenty-five years, and held that such grant did not constitute a monopoly, nor was it in conflict with that provision of the constitution of Tennessee inhibiting grants in perpetuity.

City of Memphis vs. Memphis Water Co., 5 Heisk., 495, 530, 531.

The case of Skaneateles Water Co. vs. Skaneateles (1901), 184 U. S., 354, also presented an entirely different question from the one at bar, but the reasoning in that case, we submit, supports the contention of the appellant. In that case the municipality was authorized to supply itself and its inhabitants with water and had contracted with the water company for a supply of water to the village and its inhabitants for a period of five years. **After the expiration of this contract** the municipality saw fit to commence the erection of a municipal plant, and thereupon the water company sought to enjoin the city from building and erecting such plant.

Here we have a clear and palpable distinction between the facts of that case and those in the case at bar, in that the contract between complainant and defendant city is alive and does not expire until the first day of August, 1913. In that case it was contended that the municipality had by an election of methods estopped itself to build a municipal plant, but said Mr. Justice Peckham:

> "We can not see any solid foundation for the claim that there was a final and conclusive election of methods by the village, out of which sprang the implied contract, contended for, when the legislature **at that very time prohibited a contract for more than five years. It would seem in the nature of things that the election of methods was for no longer a time than the law permitted a contract to be made under the village.** After the expiration of that time we can not see why the parties were not in the same condition as to

> their respective rights than they were in before the contract for the five years was made. * * * **We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years contract,** but we fail to see the force of the claim that, on account of once making a contract with complainant for five years, the village irrevocably bound itself by a contract never to build its own plant after the expiration of the term of said contract."

It is manifest that the decision in this case was based upon the ground that the contract had expired, and the irresistible conclusion from the reasoning of Mr. Justice Peckham, who spoke for the Court, is that during the period of said contract the municipality was by necessary implication concluded from building and erecting its own water plant.

In the case of Joplin vs. Southwestern Missouri Light Co., (1903), 191 U. S., 150, it was conceded by the Light Company that the city of Joplin had not exhausted its power to grant franchises or privileges in respect of lighting its streets, and that said city had full power to grant another franchise to any person other than the Light Company. Further, the Light Company did not claim that it had any exclusive right or privilege, or that the city had agreed to refrain from granting a light privilege to any other person; but the company contended that from the mere grant of a franchise is right to carry on its business in said city, a contract was implied in its favor; but this court, speaking through Mr. Justice McKenna, in substance, held that a contract will not be implied from the mere grant of a franchise or right to do business.

In Helena Water Works Co. vs. Helena (1904), 195 U. S., 383, it appeared that the period during which the water company was obligated to furnish water to the city was limited to the term of five years, which had expired long before the city

set about supplying its own works; and it further appeared that the ordinance upon which the water company based its right to an exclusive privilege contained a provision expressly declaring that the grant by the city to the water company should not be exclusive of the right of the city to contract with another company, so that the contention of the city had for its narrow support merely the grant of a franchise or right to carry on its business in the city, and therefore it was to be expected that following the repeated adjudications of this court, upon similar facts, the contention of the water company would be held unsound. In this case the decision of the Circuit Court of Appeals for the Ninth Circuit, was affirmed, and we therefore deem it proper to call the attention of this Honorable Court to that part of said opinion which fully covers the precise question before Your Honors. Speaking for the Court, Judge Morrow, among other things said:

> "We are further supported in this view of the ordinance by an examination of Section 6, where it is provided that the water company shall furnish and provide a full, ample, and sufficient supply of good, pure, wholesome, and clear water for the use and wants of the inhabitants of the city, and to provide the city with water for fire, sewerage (maintenance and construction), and other purposes, and that such supply shall be full, ample and sufficient for the present population of the city and for the future population of the city, as the same may be from time to time, 'during the full term of five years.' This section might properly be construed as a contract with the water company that the water company should have the exclusive right of supplying the city and its inhabitants with water during the first five years of the franchise. It might also be construed as an implied agreement that the city would not establish a plant of its own for the purpose of supplying water to its inhabitants or for its

> **own purposes during that period.** But this period of five years has long since expired, and the section now only serves to indicate that for the remaining 15 years of the franchise there was no exclusive franchise granted to the water company, and no implied agreement that during this last period it would not engage in the business of supplying water to the inhabitants of the city or for its own municipal purposes."
>
> **City of Helena vs. Helena Water Works Co., 122 Fed. Rep., 13.**

We next call the attention of Your Honors to the case of Cunningham vs. The City of Cleveland (C. C. A.), 98 Fed. Rep., 657-666, which we relied upon in the court below, but which is not noticed in the opinion of the court. In that case was involved, to some extent, the construction of a contract between the Cleveland Water & Electric Light Company and the City of Cleveland, a Tennessee municipal corporation, which was authorized to provide a supply of water for itself and its inhabitants, and grant privileges in respect thereof limited to 20 years. It is proper to observe that the charter of said water and light company was not granted under the Act of 1877, providing for the incorporation of water companies, and the exact terms and provisions of the contract between the parties are not set out in the opinion of the court. But it sufficiently appeared that the right to furnish water and lights to said city at certain stipulated prices had been granted, and the company was required to provide a designated number of hydrants and public lights, and as many more as the city might require. It was objected on behalf of the city that this contract secured to the company an exclusive privilege of furnishing water and light, and created a monopoly, which was beyond the power of the municipal board because not expressly conferred. Responding to this contention, Judge Taft, speaking for the Court, said:

> "The position is untenable. There is not one word in the contract forbidding the City of Cleveland from making exactly the same contract with another set of grantees. It is true that the city binds itself to use 40 public hydrants and 18 public lights; and it might at once, without the slightest infraction of the contract, agree to rent 40 other public hydrants and 18 other public lights from other persons or companies than the grantees of this franchise."

But in this case it is significant to note that Appellee City covenanted not to do the very thing for the lack of which Judge Taft reached the conclusion that the Water & Light Company did not have an exclusive privilege or monopoly. That is, in the contract before this Court, the city expressly obligated itself not to take water from any other person or corporation for itself or allow any other person or corporation to furnish water to its inhabitants during the full period of 30 years. Moreover, a complete answer to the contention made in the Cunningham case, is to be found in the decision of the Supreme Court of Tennessee in Memphis vs. Memphis Water Co., **supra,** wherein that court held that under the Tennessee constitution prohibiting monopolies, an exclusive grant limited to 25 years did not constitute a monopoly.

And in this connection we also call the attention of Your Honors to the holding of the Circuit Court of Appeals for the Sixth Circuit in Cunningham vs. The City of Cleveland, **supra,** that the City of Cleveland, under an authority no broader than that conferred upon the City of Knoxville, **had full power to contract for a supply of water for itself and its inhabitants arising out of its business and proprietary powers, and not in the exercise of its governmental and legislative functions;** that the distinction between such powers and functions is well marked, and that when the city, in virtue of its business or

proprietary powers entered into a contract which it was authorized to make, such contract is irrevocable.

Cunningham vs. Cleveland (C. C. A.), 98 Fed. Rep., 663.

Further, it seems to be well settled that while the action of municipal corporations is to be held strictly within the powers expressly or by necessary implication conferred upon it, yet within these limits they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction.

Dill. Mun. Corp. (4th Ed.), Sec. 91, Note 2.
Smith vs. Madison, 7 Ind., 86.
Memphis vs. Adams, 9 Heisk. (Tenn.), 518.

In the case of City of Indianapolis vs. Indianapolis Gas Light & Coke Co., 66 Ind., 407, the Court said:

> "When it (a municipal corporation) makes a contract within the scope of its powers—not **ultra vires**—which is not against public policy, and not fraudulent, it must be enforced the same as the contract of a business corporation, or a person."

For these reasons we insist that no other reasonable or just interpretation can be placed upon the contract of July 1st, 1882, than that the city thereby contracted that during the life of said contract it would not enter into competition with appellant, and that the rights by said contract conferred upon appellant are, as held in the case of Troy Water Co. vs. Troy, 200 Pa. St., 430, entirely inconsistent with a reserved purpose on the part of the city authorities of Knoxville to render the investment of appellant absolutely worthless as soon as it might be completed, by the erection of water works of their own. This construction is not only just and reasonable, but it is the inevitable conclusion which must be placed upon the terms and pro-

visions of said contract, viewed in the light of the circumstances under which it was made.

White vs. Meadeville, 177 Pa. St., 643.

Memphis Gayoso Gas Co. vs. Williamson, 9 Heisk., 326.

This case is not referred to in the opinion of the court below. Although plainly distinguishable in its facts, as will be shown, the inevitable inference from the reasoning of the Supreme Court of Tennessee therein is to sustain the position of appellant in this case.

In that case, although instituted to recover damages for alleged malicious prosecution, it became necessary to determine whether the Memphis Gas Company, chartered by the Legislature of 1851, with all the rights, privileges, etc., which had been conferred upon the Nashville Gas Light Company, incorporated in 1849, had an exclusive right to manufacture gas for the City of Memphis and its inhabitants. The claim to an exclusive right rested mainly upon the third section of the Act of 1849, which is as follows:

> "Section 3. It shall be the duty of said company to establish within three years from the first day of January, 1850, a gas manufactory within the City of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas light as may be required."

By Section 5 the **privilege** was given to the company of erecting gas works and manufacturing and vending gas in the City of Memphis by means of public works, for the term of fifty years from and after the date of said act. **There was nothing in the act excluding other companies from the right to erect gas works or to sell gas in said city.** The court held that "the plain, obvious meaning of the legislature was to secure the establishment of gas works by the end of three years, of suffi-

cient capacity to supply the demand for gas light at that time." And that the two sections above referred to, construed together, mean that:

> "The company is **obliged** to have gas works completed at the end of three years sufficient to furnish all the gas that may be then required. If the duty thus imposed is discharged the obligation then ceases and from that time the company can go on to exercise the **privilege** granted for fifty years." (The blacks are by the court.)

So Your Honors will see that this wac a very different case in its facts, from the one at bar. If the contract between appellant and appellee city had merely provided that the company should erect and establish a system of water works sufficient to supply said city with water, and that such works should be completed within twelve months after the time stipulated, as provided in Section 8 of said contract (Rec., p. 35), then we concede that the probable construction of such contract would be that the company **had only obligated itself to build within twelve months a system of water works sufficient to furnish the city with water at that time.** But in addition to these provisions, the requirement is that the company shall construct works not only sufficient to supply said city with water for all the purposes stipulated in said contract, but shall **maintain said works** in **such condition as may be sufficient and necessary to enable it to comply with all the undertakings set forth in said contract for a period of thirty years.** It is to be noted that it is only under this covenant to **maintain** the water works for a period of thirty years in a condition necessary and sufficient to enable it to comply with its undertakings thereunder, that the Water Company, after having built within one year a plant in compliance with the plans furnished by the city, can be, and is, compelled, at all times within said period, to have

said plant in such condition as may be sufficient to meet the needs of the city and its inhabitants, for fire protection, public, sanitary and domestic purposes. If it were not for this requirement, could not the Water Company at any time discontinue the operation, or even dismantle, its plant?

San Antonio St. Ry. Co. vs. State, 99 Texas, 520.
Northern Pac. R. R. Co. vs. Washington, 152 U. S., 492.

But in addition to all this, as was not done in the case of the corporation whose charter was construed in the **Williamson** case, supra, the city covenanted that neither any person or corporation should have during said thirty year period any contract or privilege to furnish either the city or its inhabitants with water. And it was in construing these very provisions manifesting the plain, obvious meaning of the parties that appellant should have the sole right to furnish water to said city and its inhabitants for a period of thirty years, that this Court, in a case between appellant herein, as plaintiff in error, and appellee city herein, as defendant in error, 189 U. S., 435, said:

> "In the same year (referring to the date of the charter of appellant) 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, the city gave the company **exclusive privileges for thirty years and agreed to make certain payments**, etc., and it was mutually agreed, among other things, that, after fifteen years, the city should have the right to purchase the works at a price to be fixed by appraisers if not agreed upon."

Knoxville Water Co. vs. Knoxville, 189 U. S., 435.

Is the city not estopped to deny the exclusive character of appellant's rights even in the streets of the city for the limited period of thirty years?

ESTOPPEL IN PAIS.

It is plain that the intention of the parties was to make the rights of appellant, even in the streets of the city, exclusive for the period of thirty years; and that relying upon such rights and the good faith of the city, appellant was induced to build works for the benefit of the city and its inhabitants, at an outlay of several hundred thousands of dollars and its stocks and bonds were purchased by and are now held and owned by many innocent holders whose savings are invested therein, upon the faith and, as averred in the bill, with the distinct understanding, that the City of Knoxville would not, within the period of said contract, build works on its own account to compete with the plant and business of appellant. All this the city not only permitted, but procured to be done. There is no taint of fraud in the contract—and everything done thereunder, has been for the public good. Therefore, would it be any sufficient answer by appellee city to say that it has exceeded its charter powers in attempting to grant an exclusive right for a limited period in its streets, or in agreeing not to build on its own account, water works to compete with appellant? As said by Judge Dillon:

> "Municipal corporations, as we have seen, have, in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trust, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have

pleaded against it the statute of limitations. But such a corporation does not own, and can not alien, public streets or places, and no mere laches on its part, or on that of its officers, can defeat the public right thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be supported even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author can not assent to the doctrine that, as respect public rights, municipal corporations come impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle, but there is no danger of recognizing the principle of an **estoppel in pais** as applicable to exceptionable cases, since this leaves courts to decide the question, not by mere lapse of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

2 Dill. Mun. Corp. (4th Ed.), Sec. 675.

We respectfully submit to Your Honors that it would be most difficult to conceive of a case wherein the facts would more strongly appeal to a court of equity, or where there could be private rights of more persuasive force to be protected against the public, than appear in the facts of this case.

This principle has been repeatedly recognized, and, citing the text, enforced in Tennessee:

In Dennis vs. Rainey, 8 Baxt., 501-4, it was cited approvingly in favor of a party who, under some claim of right had been in possession of and improved with full knowledge of the municipal authorities, a part of a public street.

In the City of Memphis vs. Looney, 9 Baxt., 129-135, it was cited approvingly where the statute of limitations had been pleaded against the enforcement of certain municipal taxes.

And in Sims vs. Chattanooga, 2 Lea, 695-700, it was also cited approvingly, but upon the particular facts of this case it was held that there was no estoppel in favor of the claimant of part of the public street.

In the case of Land Co. vs. Jellico, 103 Tenn., 320, the complaining Land Company sought to recover a certain sum of money for grading one of the streets of defendant, a municipal corporation, under a contract made for that purpose. The court held that the contract was invalid because entered into at a void special meeting of the City Council, but the defendant having permitted the work contemplated by the charter to be completed by complainant under the belief that all was satisfactory, the defendant city would not be heard to deny liability therefor.

In Gas Light Co. vs. Memphis, 93 Tenn., 612, it was held that a municipal corporation, although expressly restricted by its charter to contract in writing, and to create no general liability, was nevertheless liable, upon an implied contract, to pay for gas used for lighting its streets, because "the general law independent of express contract, imposes an obligation upon the city to do justice with respect to the same."

* Dill. on Mun. Corp. (4th Ed.), Sec. 460.

ESTOPPEL BY JUDGMENT.

We have endeavored to show that appellant and appellee were, by proper construction of their charters, fully authorized to enter into the contracts relied upon by appellant, and that under a proper interpretation of said contracts no other reasonable or just conclusion can be reached than thereby it was agreed that appellee would not construct and operate water works on its own account in competition with appellant during the continuance of said contracts; but in addition to all this we respectfully insist that these are no longer open ques-

tions, but have been adjudicated in favor of the contention here made by appellant. In support of this proposition we call the attention of Your Honors to the averments of the bill, showing that some three years after the plant of appellant had been built and put in operation under the contract of July 1, 1882, the city refused to pay the hydrant rentals accruing under said contract, whereupon suit was instituted by the Water Company to enforce said contract and collect the hydrant rentals thereunder. To this suit, it is averred in the bill, the City of Knoxville, "first interposed a plea which was overruled and thereupon * * * filed an answer in and by which it set out every possible defense that could be made, by able and ingenious counsel among which were a denial of the validity of the contract of July 1, 1882, and that appellant had complied therewith." This suit was instituted in and, upon the issue made and proof taken, determined in favor of the Water Company by the Chancery Court of Knox County; and thereupon an appeal was prayed and granted the city to the Supreme Court of the State, where the judgment and decree of the Chancery Court of Knox County was in all things affirmed. Whereupon a petition to rehear was filed, which was dismissed, on the ground "that there was no merit set up in the defense made by" the City of Knoxville, appellee herein. (Rec., pp. 6, 7.)

Therefore, we submit that upon and by the judgment of the Chancery Court of Knox County, in all things affirmed by the Supreme Court of the State of Tennessee, appellee herein is estopped to deny the validity of said contract, of July 1, 1882.

Further, the bill shows (Rec., p. 12) that in certain litigation between the City of Knoxville, appellee herein, and appellant, involving the right of said appellee to regulate the rates and charges of appellant for water furnished under said contract of July 1, 1882, and the various amendments thereto, appellant plead said contracts and claimed thereunder that it

was protected from regulation or further interference by the city in respect of its rates and charges; but while the Supreme Court of Tennessee (107 Tenn., 647), and this Honorable Court (189 U. S., 434), held that under the second section of the act providing for and authorizing appellant's charter, there was expressly reserved to the city the right to regulate the rates and charges of appellant for water, yet both courts recognized said contracts as binding, both upon appellant and appellee, and this court construed said contract of July 1, 1882, as giving to appellant the privilege and rights which it is seeking to enforce in this case.

It is true that in the litigation involving the right of the city to regulate the water rates and charges of appellant, the precise points upon which the city rests its contention in this case were not made; but in determining the question at issue between the parties it was necessary to consider and proper to construe the contracts.

The Supreme Court of Tennessee, without passing upon the exclusive character of the franchises, expressly recognized as valid agreements between the parties the several contracts exhibited with the bill in this cause.

Knoxville vs. Knoxville Water Company, 107 Tenn., 647.

This case came before Your Honors upon writ of error to the Supreme Court of Tennessee, and this Court, after stating that appellant was incorporated in 1882, to construct water works in or near Knoxville, with power to contract with the city and inhabitants for a supply of water, said:

> "In the year, 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, **the city gave the company exclusive privileges for 30 years,** and agreed to make certain payments, etc., and it was mutually agreed, among

other things, that after fifteen years the city would have the right to purchase the works at a price to be fixed by appraisers, if not agreed upon."

Knoxville Water Company vs. Knoxville, 189 U. S., 434, 435.

Therefore, we submit, and respectfully insist, that not only has the validity of the contracts between appellant and appellee been adjudged in a case wherein the validity of said contract was directly in issue, but that this court has held that the rights of appellant under said contract are exclusive for a period of thirty years, as herein contended.

Was the recognition of the contract of July 1, 1882, and the amendment thereto of October 20, 1899, by the Legislature, in Chapter 12 of the Acts of 1903, a ratification of said contract?

It is shown in the bill that the representatives of Knox County, including the City of Knoxville, in the General Assembly of Tennessee, offered and pressed for passage by said Assembly, a bill which was enacted into a law, and is known as Chapter 12 of the Acts of 1903.

Rec., pp. 13, 71, 74.

Said Act expressly recites that under and by virtue of said contract of July 1, 1882, and the amendment thereto of October 20, 1899, appellee city had the right to purchase all the property owned by appellant at a valuation to be fixed by an appraisement, and further reciting that appellee desired to take up said option and purchase said plant, authorized appellee to issue a sufficient amount of bonds to purchase the property of appellant as the same might be determined by an appraisement under the terms of said contract. We submit to Your Honors that even if by the strictest construction it could be held that appellant and appellee, were without author-

ity to enter into the contract of July 1, 1882, or that appellee was without authority to contract with appellant for its sole supply of water during a limited period, the recognition of said contract by the Legislature of Tennessee (Chapter 12 of the Acts of 1903), was sufficient to cure whatever lack of authority there might have been for said contract when the same was executed.

We apprehend that it will be admitted that if the Legislature had expressly authorized the making of said contracts in the first instance, the same would unquestionably be valid.

It is well settled that it is within the power of the legislature to give force and validity to any act where it has power to authorize in advance such act to be done.

Shields vs. Land Co., 94 Tenn., 123;
Butler vs. Tennessee, 97 Tenn., 679;
Commanche County vs. Lewis, 133 U. S., 198.

Following the cases just cited is the case of **Muse vs. Lexington, 110 Tenn., 655, 665, 666,** wherein the Supreme Court of Tennessee held that the implied legislative recognition of a municipal charter fatally defective and invalid on account of omissions, and failure to comply with the statutory requirements in the general law providing for the incorporation of municipal corporations, is as effectual to validate the charter as any direct legislation expressly validating the same could be. Now, applying this principle, we ask: Is not the recognition of the contract of July 1, 1882, by the Legislature of Tennessee, as above shown, as effectual to give life and validity to the same as an express declaration contained in the statute would have been?

We submit that the recognition of the Legislature was not confined to the right of the city to purchase the plant and property of appellant. The entire contract was recognized. The

rights of the Water Company and the city were, and are, correlative—the rights of the one depend upon the rights of the other. The Water Company was required to maintain its plant and property for a period of thirty years, unless within that time the city should desire to exercise the right reserved to it under said contract. This obligation to maintain the plant for thirty years, and the correlative obligation of appellee to take water from appellant during that time in order that the obligation of appellant might be effectuated, could only be terminated by the exercise of the right to purchase as provided in said contract. The act does not merely recite that the city has the right to purchase the plant and property of appellant, but expressly recognizes the contract itself, and the amendment thereto of October 20, 1899, which extended the right to purchase to all the property which the Water Company then owned, or might thereafter acquire, so as to exclude any possible claim that the right of purchase under the contract of July 1, 1882, was limited to the plant as it was originally built under that particular contract.

We further submit that the recognition of a contract, unless plainly limited, extends to every part thereof—and to the construction which the law places thereon—and it is manifest that the representatives of the City of Knoxville in the General Assembly, placed the same construction upon this contract as appellant does, therefore the city desired to terminate said contract and operate a plant on its own account, which it could only do by acquiring the property of appellant under and in the manner provided in the contract.

We submit if a mere recognition of an utterly void municipal charter by an Act of the Legislature, is sufficient to infuse life into such charter so as to supply a lack of power to encumber its property and that of its citizens with a large amount of bonds,—that the recognition given to the contract of July

1, 1882, by the Legislature of Tennessee, by Chapter 12 off the Acts of 1903, is as effectual a ratification of said contract as any direct legislation expressly validating the same would have been.

The contracts relied upon by appellant are protected by the Constitution of the United States.

In conclusion, we submit to Your Honors, upon the reasons hereinbefore stated, that Chapter 153 of the Acts of a General Assembly for the year 1903, and the doings of appellees thereunder as set out in the bill, violate the obligations off the several contracts between appellant and appellee city, and deprive appellant of its property without due process of law.

Walla Walla Water Co. vs. Walla Walla, 172 U. S., 1.
City of Los Angeles vs. Los Angeles Water Co., 177 U. S., 558.
Detroit vs. Railway Co., 184 U. S., 368.
Vicksburg Water Works vs. Vicksburg, 185 U. S., 65.
St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.

Further, we submit, upon these authorities, that appellant has properly invoked the aid of a court of equity, and is entitled to the specific relief prayed in the bill, that is, that said Chapter 153 of the Acts of 1903 be declared void and appellees be restrained from constructing water works to be run in competition with appellant during the life and continuance of the contracts exhibited with the bill in this cause.

Respectfully submitted,

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Solicitor for Appellant.

APPENDIX A.

References to statutes authorizing City of Knoxville to procure a water supply.

1. The City of Knoxville was incorporated by an act of the General Assembly passed October 27, 1815. While this act contains no express reference to a water supply, it was provided, among other things, that, "the corporation shall have full power and authority to enact and pass such laws and ordinances as may be necessary, **to preserve the general health,**" etc. * * * "and to pass all laws and ordinances necessary to carry the intent and meaning of this act into effect."

2. By an amendment to this act, passed January 19, 1838, the city was expressly authorized to borrow a sum of money not exceeding $50,000.00, for the purpose of erecting water works and supplying the city with water.

3. By another amendment of the charter of said city, passed December 7, 1866, the following provision was made:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the Mayor and Aldermen of the City of Knoxville shall have and exercise all of the rights, powers, authorities and privileges which have heretofore been conferred by law upon the City of Nashville."

Thus, it is seen, that in addition to its former powers, the City of Knoxville had conferred upon it all of the rights, powers and privileges theretofore vested in and conferred upon the City of Nashville.

4. The City of Nashville was incorporated by an act passed January 31, 1848, found in the session Acts of 1847-1848, Chapter 68, pages 266-271. This act contained the following provisions bearing upon the question of a water supply:

Section 1, authorized the city, among other things, to "receive and hold property, real, and personal, beyond the limits of the city, to be used for the burial of the dead, for the erection

of water works, for the establishment of a hospital, for a poor house, work house, or house of correction * * * and to do all acts touching the same as natural persons," etc.

Section 6 of said act which, in 37 sub-sections, defines the powers of the city, provides, among other things, the following:

Sub-section 7. To make regulations **to secure the general health of the inhabitants,** and to prevent and remove nuisances.

Sub-section 8. **To provide the city with water, by water works, within or beyond the boundaries of the city.**

Sub-section 24. **To provide for the prevention and extinguishment of fires,** etc.

Sub-section 37. **To pass all ordinances not contrary to the constitution and laws of the State, that may be necessary to carry out the full intent and meaning of this act, and to accomplish the object of their incorporation.**

By Chapter 68 of the Session Acts of 1857-1858, Section 12 to 17 inclusive, the City of Nashville was given an additional charter; however, the principal purpose of this additional charter seems to have been, after re-enacting in Section 12, the substance of Section 1 of the act of 1847-1848, to make certain changes in the municipal legislature and the terms and the manner of electing municipal officers. This additional act contains nothing specially bearing upon the question, and need not be further noticed.

Such were the powers conferred upon the City of Knoxville by the act of 1866.

4. By an act passed June 10, 1885, being Chapter 8 of the session acts of the extra session of that year—and more than three years after the City of Knoxville and the Knoxville Water Company had entered into the contract of July 1, 1882—all the acts incorporating the City of Knoxville were compiled into one statute, and among other things, it was provided thereby:

By Section 2 of this act it was provided that the city "may purchase, receive and hold property, real and personal, within or beyond the limits of the city, to be used for the burial of the dead, for the erection of water works, work houses, houses of correction, hospitals or pest houses * * * and do all acts touching the same as natural persons," etc. This was re-enacting Section 1 of Chapter 68 of the Acts of 1847.

By Section 18 of said Act of 1885 it was provided that "The Mayor and Board of Aldermen shall have the following powers:

Sub-section 6. **To make regulations to secure the general health of the inhabitants,** and to prevent, declare and remove nuisances.

Sub-section 7. **To provide the city with water by water works within or beyond the boundaries of the city, or provide for supplying the city with water otherwise, and to provide for the prevention and extinguishing of fires, and to organize and establish fire companies.**

Thus it will be seen that Sub-section 6 of this Act was identical with Sub-section 7, above quoted of Section 6 of Chapter 68 of the Acts of 1847-1848; and that the provisions of Sub-sections 8 and 24 of Section 6 of the Act of 1847, were practically consolidated into Sub-section 7 of Section 18 of the Act of 1885.

Sub-section 29. To grant a right of way through the streets, avenues and squares of said city, for the purpose of street or other railroads, and for such other purposes as the Board of Aldermen may provide by ordinance; provided, that the Board of Aldermen shall not grant an exclusive right to the use of streets for any purpose, to any one person, company or corporation.

This sub-section contains the first express grant of power found in any of the acts incorporating the City of Knoxville to grant a right of way through its streets, either for street or

other railroads, or any other purpose. And in this connection it is proper to say that it is settled law in Tennessee that the power to grant to a public corporation a right of way or franchise in or over the streets of the city or other public thoroughfares, resides primarily in the legislature of the State, (Railroad vs. Adams. 3 Head, 597), and that at one time it was held (Railroad Co. vs. Memphis, 4 Cold., 415), that this power could not be delegated by the legislature to a municipality, but the right of the General Assembly to vest such power in the municipalities of the State is now recognized. (Citizens, etc., R. R. Co. vs. Africa, 110 Tenn., 83.)

But, as shown in the brief, there can be no doubt that the franchises of the Water Company, both its corporate franchises and its rights or easements in the streets, emanated directly from the State.

Sub-section 33. To take and appropriate, in the manner hereinafter provided, grounds adjacent to the corporation line, for water works purposes, site for pumping station, reservoir, upon the payment of damages.

6. The acts incorporating the towns of North and West Knoxville, which are now, respectively, the tenth and eleventh wards of the city, contain practically the same grant of powers as is contained in the charter of the City of Knoxville, enacted in 1885.

7. By an act passed January 29, 1903, approved February 2, 1903, and known as Chapter 12 of the Acts of 1903, the City of Knoxville was authorized to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto and maintain and operate the same. This act is Exhibit No. 9 to the bill, and is found in the Record, pp. 71-74.

8. By Chapter 153 of the Acts of 1903, passed March 31, 1903, and approved April 3, 1903, the City of Knoxville was authorized to issue bonds, either to erect an independent plant, or, under certain conditions, purchase the property of the Knoxville Water Company. This act is Exhibit No. 10 to the bill in this cause, and is found in the record on pages 74-80.

APPENDIX B.

Acts of 1877, Chapter 104.

AN ACT to amend an Act entitled "An Act to provide for the organization of corporations," approved March 23, 1875, and grant charter to water companies.

Section 1. **Be it enacted by the General Assembly of the State of Tennessee,** That the form of charter for a water company shall be as follows: "State of Tennessee. Charter of Incorporation. Be it known, that (here insert the names of five or more persons not under twenty-one years of age) are hereby constituted a body politic and corporate by the name and style of (here insert the name of the Compa[illegible]). The general forms, etc., of said corporation are (here insert the general powers, etc., as directed in Section 5, Act March 23, 1875). The business of said company shall be to establish and construct water works in or near the town, city or village of (here insert the name), and it shall be the duty of said company to build, furnish and equip water works of sufficient capacity to furnish the corporate authorities and inhabitants of said town, city or village with water. To enable the company to establish such works they are hereby authorized and empowered to lay down pipes through the streets, lanes and alleys of said town, city or village, in such manner, however, as to produce the least possible inconvenience to the town, city or village, or its inhabitants, or to travelers, and to take up pavements and sidewalks; **Provided** they shall repair the same with the least possible delay. The company shall have power and are hereby authorized, to bring into the said town, city or village a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said town, city or village, and the environments thereof, and all who may be along the line of said companies' pipes, and of erecting hydrants or fire plugs within the said town, city or village, and to contract with said

inhabitants and with the corporate authorities of said town, city or village, or any incorporated companies, for the use of said water, and charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of said company may from time to time prescribe. The works and operations of said company shall be so constructed and managed that no annoyance shall accrue therefrom to the health and comfort of the inhabitants of said town, city or village, and nothing in this Act shall be so construed as to absolve the company, its officers or agents, from any legal proceedings to restrain or abate any nuisance arising from such water works or operations.

If any person or persons shall injure or destroy any portion of the water pipes or other property belonging to said company, or shall wilfully open a communication into the street or other water pipes, or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceeding, and also a penalty not exceeding five hundred dollars, upon conviction before a court having jurisdiction of the offense. If any person or persons shall take or use any of the water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company, such person or persons shall forfeit and pay to the said company the sum of fifty dollars, to be recovered before any Justice of the Peace in the same manner as other debts are collected by law: **Provided**, that nothing herein contained shall be construed to compel the inhabitants of said town, city or village to use the water so introduced by said company, or to prevent them from using water obtained in any other way. If any person or persons shall wilfully corrupt or permit anything to run into or fall into any stream or reservoir from which the said company shall take water to be introduced into said town, city or village,

which shall corrupt the same, or to render it unpalatable, unwholesome or unfit for domestic or manufacturing use, or for the supplying of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same, on being convicted thereof before any Justice of the Peace of the civil district in which said water is situated, shall pay a fine of not less than ten nor more than fifty dollars, one-half to the use of the informer, the other half to the use of said company, and shall moreover remain liable to said company for all damages.

Sec. 2. **Be it further enacted,** That such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village, in which it is proposed to operate such water works, and such leave shall be certified by the Mayor or Recorder upon the application, and registered with it. And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.

Sec. 3. **Be it further enacted,** That said Act approved March 23, 1875, be and the same is hereby further amended so that all corporations shall have obtained, or that may hereafter obtain charters under Section 11 of said Act of 1875, shall in addition to the powers specified in said Act, also have power to raise, buy, sell and deal in agricultural products, operate flouring and other mills, and deal in merchandise.

Sec. 4. **Be it further enacted,** That this Act take effect from and after its passage, the public welfare requiring it.

EDWIN T. TALIFERRO,
Speaker of the House of Representatives.

HUGH N. McADOO,
Speaker of the Senate.

Approved March 27, 1877.

JAS. D. PORTER, Governor.

APPENDIX C.

Form of Charter for Street Railroad Companies Provided by the General Incorporation Act of Tennessee, Chapter 142 of the Acts of 1875, Shannon's Code, Sections 2392 et seq.

2392. **Form of Charter.**—The form of a charter for a street railroad shall be as follows:

State of Tennessee.

Charter of Incorporation.

Be it known, That (here copy the names of fire or more corporators not under the age of twenty-one years) are hereby constituted a body politic and corporate, by the name and style of (here insert the name), for the purpose of constructing a street railroad in the incorporated town of (here insert the name of the town), commencing at (here insert the initial terminus) and ending at (here insert the terminus and the general route of the road).

2393. **Rights and powers of such incorporations.**—The general powers, etc., of said incorporators are (here insert the powers as declared in Sections 2054-2060). The said company is authorized to consummate any contract with the city authorities of the town aforesaid, or with the county court, if the route extends or is to be extended, beyond the limits of said incorporated city, or with private individuals necessary to get the right of way along the public streets of the city, or along the public roads of the county; **Provided,** That no one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed, prescribing the terms on which the same may be done; or, if the said road extends into the country, the consent of the county court must be first obtained.

The remaining portions of said act are not material to the question before the Court.